

**FILED BY CLERK**

**MAR -4 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2009-0135
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
DOUGLAS McARTHUR SKINNER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800567

Honorable Janna L. Vanderpool, Judge

AFFIRMED

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Terry Goddard, Arizona Attorney General  
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Tucson  
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B R A M M E R, Judge.

¶1 Douglas McArthur Skinner appeals from his conviction and sentence for promoting prison contraband. He asserts the trial court erred by denying his motion for a

judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., and contends the statute defining contraband, A.R.S. § 13-2501, is unconstitutionally vague. We affirm.

### **Factual and Procedural Background**

¶2 On appeal, we view the facts in the light most favorable to sustaining Skinner’s conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2007, an Arizona Department of Corrections (ADOC) investigator received an anonymous telephone call informing him that Skinner and his prison cellmate, Marcus Wilborn, were in possession of a cellular telephone. The investigator and another officer went to Skinner’s and Wilborn’s cell and found Skinner sitting on his bunk, holding a cellular telephone and pushing buttons on it. After searching the cell, the officer found the cellular telephone’s charger hidden inside Wilborn’s mattress. The cellular telephone had been used to receive text messages.

¶3 A grand jury charged Skinner and Wilborn with violating A.R.S. § 13-2505 by “knowingly making, obtaining or possessing prison contraband, to wit: [a] cell phone, while confined at [ADOC].” After a three-day trial, the jury found Skinner and Wilborn guilty. The trial court sentenced Skinner to a two-year prison term, to be served consecutively to the sentence he already was serving. This appeal followed.

### **Discussion**

#### **Motion for Judgment of Acquittal**

¶4 Skinner first asserts the trial court erred by denying his Rule 20 motion, arguing the state did not prove the cellular telephone was contraband as defined by

§ 13-2501(1). A trial court may only grant a Rule 20 motion “if there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). “If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a motion for acquittal should not be granted.” *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). “We conduct a de novo review of the trial court’s decision, viewing the evidence in a light most favorable to sustaining the verdict.” *Id.*

¶5 A person commits promoting prison contraband by, inter alia, possessing contraband while confined in a correctional facility. § 13-2505(A)(3). Section 13-2501(1) defines contraband as “any dangerous drug, narcotic drug, marijuana, intoxicating liquor of any kind, deadly weapon, dangerous instrument, explosive or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility . . . or of any person within a correctional . . . facility.” Skinner asserts the use of the word “would” in § 13-2501, as opposed to “could,” means the item of contraband “must” endanger the safety, security, or preservation of order in the prison. Thus, he reasons, because a cellular telephone “could have a benign use within a prison” and there was no evidence Skinner’s cellular telephone specifically “was used to disrupt [the prison] by planning a gang murder . . . , gang misconduct, or transmittal of drugs,” the state failed to prove the cellular telephone was contraband.

¶6 Even assuming the particular item possessed “must” have “endanger[ed] the safety, security, or preservation of order” in the prison in order to fall within the

definition of contraband in § 13-2501(1), nothing in the statute requires, as Skinner suggests, such endangerment to take the form of illegal activity. And there was ample evidence Skinner’s possession of the cellular telephone was not “benign.” The ADOC investigator testified that cellular telephones disrupt the operation of a prison because “communications by inmates in a correctional facility are . . . monitored by the correctional facility,” which the use of cellular telephones would circumvent. Moreover, inmates are only permitted telephone contact with ten individuals—a restriction that could not be enforced if prisoners were allowed to communicate via cellular telephone. Based on this evidence, a jury reasonably could conclude Skinner’s possession of the cellular telephone enabled him to evade the prison’s monitoring of and restrictions on communications, thereby endangering the security and preservation of order in the prison. And the evidence demonstrates Skinner had used the cellular telephone for just that purpose. Accordingly, the trial court did not err in denying Skinner’s Rule 20 motion.

#### Due Process

¶7 Skinner also asserts “[t]here was no testimony [the ADOC policy concerning items inmates may and may not possess] . . . was ever provided to [him] . . . [that] inmates were verbally informed of [the policy] . . . [, or that] this policy was posted in some conspicuous place.” As we understand his argument, Skinner reasons his conviction therefore violates due process. But, because Skinner does not develop this argument meaningfully or provide citations to relevant authority, we decline to address it

further. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (“[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant’s position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.”), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant’s brief shall include argument stating contentions, reasons therefor, and necessary supporting authority).

#### Other Constitutional Claims

¶8 Skinner next contends the definition of contraband in § 13-2501(1) is unconstitutionally vague because it “is so overbroad and general that virtually any ordinary item could be an item which could endanger the safety and security of a prison.” A statute is “unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits.” *State v. Takacs*, 169 Ariz. 392, 394, 819 P.2d 978, 980 (App. 1991). The party challenging a statute’s validity has the burden of overcoming a strong presumption of its constitutionality. *See State v. McMahon*, 201 Ariz. 548, ¶ 5, 38 P.3d 1213, 1215 (App. 2002). “[D]ue process does not require that a statute be drafted with absolute precision.” *Takacs*, 169 Ariz. at 395, 819 P.2d at 981. Additionally, the omission of an explicit definition for a statutory term or the fact that a statute may be susceptible to different interpretations does not render the statute unconstitutionally vague. *State v. Lefevre*, 193 Ariz. 385, ¶ 18, 972 P.2d 1021, 1026 (App. 1998). And “[a] legislative enactment ‘is not void for vagueness simply because it

may be difficult to determine how far one can go before the statute is violated.’” *State v. Kaiser*, 204 Ariz. 514, ¶ 12, 65 P.3d 463, 467 (App. 2003), *quoting State v. McLamb*, 188 Ariz. 1, 5, 932 P.2d 266, 270 (App. 1996). We review the constitutionality of a statute de novo. *McMahon*, 201 Ariz. 548, ¶ 5, 38 P.3d at 1215.

¶9 Although Skinner argues “virtually any ordinary item” could be considered contraband under § 13-2501(1), “[w]hether a statute is unconstitutionally vague is generally determined by examining its application to the facts of the particular case.” *In re Moises L.*, 199 Ariz. 432, ¶ 10, 18 P.3d 1231, 1233 (App. 2000). “The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.” *New York v. Ferber*, 458 U.S. 747, 767 (1982); *see also State v. Trachtman*, 190 Ariz. 331, 334, 947 P.2d 905, 908 (App. 1997) (“Even if an ordinance or statute may be vague in some particulars, a person ‘to whose conduct a statute clearly applies may not successfully challenge it for vagueness.’”), *quoting Parker v. Levy*, 417 U.S. 733, 756 (1982). We therefore agree with the state that the relevant inquiry is not whether a person of ordinary intelligence would understand that possessing unspecified “ordinary item[s]” was prohibited, but instead whether that person would understand that a cellular telephone is contraband under § 13-2501(1)—that its possession or use “would endanger the safety, security or preservation of order” in a prison.

¶10 It is common knowledge that a correctional facility is a highly restricted area and that inmates’ possession of otherwise-legal items is prohibited. It is also common knowledge that prison inmates’ communications are restricted. And a person of ordinary intelligence would understand these restrictions preserve the security and order of the facility. *Cf. State v. Darynani*, 774 So. 2d 855, 857-58 (Fla. Dist. Ct. App. 2000) (“So long as ‘it is evident to citizens and factfinders’ whether something is covered ‘under any intended definition’ of a term and so long as the term appeals to the ‘norms of the community, which is precisely the gauge by which vagueness is to be judged,’ the statute will survive a vagueness challenge.”), *quoting L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997); *State v. Rhodes*, 795 P.2d 724, 727 (Wash. Ct. App. 1990) (“[L]ess strictness is called for in construing a penal statute when the function of notice and warning is assisted by common knowledge and understanding of conventional values.”).

¶11 Thus, we conclude a person “of ordinary intelligence” would know or have “a reasonable opportunity to learn” that a cellular telephone is contraband as defined by § 13-2501(1). *Takacs*, 169 Ariz. at 394, 819 P.2d at 980. Skinner cites no authority and offers no analysis suggesting otherwise, thereby failing to meet his burden of demonstrating the definition of contraband in § 13-2501(1) is unconstitutionally vague under these facts. *See McMahon*, 201 Ariz. 548, ¶ 5, 38 P.3d at 1215.

¶12 Skinner additionally argues the statute is unconstitutional because it permits “arbitrary or discriminatory enforcement of the rules.” *See State v. Schmidt*, 220 Ariz. 563, ¶ 5, 208 P.3d 214, 216 (2009) (statute unconstitutionally vague unless “sufficiently

definite to avoid arbitrary enforcement”). Because Skinner did not raise this argument below, we would generally review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But he does not assert on appeal the error was fundamental and thus has waived this argument. See *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant “d[id] not argue the alleged error was fundamental”). In any event, we independently have found no fundamental, prejudicial error.

### **Disposition**

¶13 We affirm Skinner’s conviction and sentence for promoting prison contraband.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge

